(3)

No. 05-1519

FILED
SEP 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ARACELY ZAMORA-GARCIA,

Petitioner,

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

ELISABETH S. BRODYAGA
REFUGIO DEL RIO GRANDE
17891 Landrum Park Road
San Benito, Texas 78586
(956) 421-3226
Attorney for Aracely Zamora-Garcia

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY ISSUES PRESENTED

1) The primary issue presented herein is whether the Fifth Circuit erred in holding that even lawful permanent residents, ("LPRs"), under removal proceedings are not entitled to Due Process in the adjudication of applications for discretionary relief. This issue is not only of vital import, but contrary to Respondent's claim, (RESP:5),[1] Fifth Circuit precedent as applied herein conflicts with various decisions of this Court, including *Ex rel Accardi v. Shaughnessey,* 347 U.S. 260 (1954), and *Heikkila v. Barber*, 345 U.S. 229 (1953), and with precedent from several Courts of Appeals;

2) Neither the Board of Immigration Appeals, ("BIA"), nor any Circuit Court of Appeals, has adopted Respondent's claim under cases such as *Coleman v. Thompson,* 501 U.S. 722 (1991), that ineffective assistance of counsel cannot form the basis of a Due Process violation in deportation proceedings;[2]

---

[1] Ms. Zamora's Petition for Certiorari is herein cited, by page, as (PET:___), and the Appendix, as (APP:___). The Brief for the Respondent in Opposition is similarly cited as (RESP:___).

[2] The terms "deportation" and "removal" proceedings are used interchangeably herein, since many of the cases cited were decided prior to the change in the nomenclature of the proceedings.

REPLY ISSUES PRESENTED – Continued

3) Ms. Zamora challenged the BIA's finding of "no prejudice" before the Fifth Circuit, but that Court did *not find against her* on the issue, so it is not ripe for consideration by this Court. To the extent that Respondent's challenge to Fifth Circuit precedent holding that a finding of "no prejudice" is subject to judicial review[3] is fairly raised by the issues presented herein, Ms. Zamora would show that it is reviewable as a mixed question of law and fact, and that, as argued before the Court of Appeals, the BIA erred herein both as a matter of law in making such a finding, and as contemplated by 8 U.S.C. §1252(b)(4)(B), that any reasonable adjudicator would be compelled to reject the BIA's underlying finding of fact, that she did not show prejudice because she "presented no significant evidence that her equities outweigh [her] offense." *See also, INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (addressing the standard of review of factual findings).

[3] *See, Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994) (In case asserting ineffective assistance of counsel for not filing a §212(c) application, "proving prejudice requires the Petitioner to make a prima facie showing that had the application been filed, he would have been entitled to relief").

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	REBUTTAL FACTS	2
III.	REBUTTAL ARGUMENT	3
	A. THE FIFTH CIRCUIT'S HOLDING THAT EVEN LPRS ARE NOT ENTITLED TO DUE PROCESS IN MATTERS RELATING DISCRETIONARY RELIEF CONFLICTS WITH VARIOUS DECISIONS OF THIS COURT, WITH OTHER CIRCUIT PRECEDENT, AND EVEN WITH ITS OWN PRIOR DECISIONS	3
	B. NEITHER THE BIA, NOR ANY CIRCUIT COURT OF APPEALS, HAS ADOPTED RESPONDENT'S CLAIM (UNDER CASES SUCH AS *COLEMAN*), THAT INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT CAUSE A DUE PROCESS VIOLATION	4
	C. THE FIFTH CIRCUIT DID NOT REJECT MS. ZAMORA'S CHALLENGE TO THE BIA'S FINDING THAT SHE DID NOT SHOW PREJUDICE FROM HER ACCREDITED REPRESENTATIVE'S FAILURE TO TIMELY FILE HER APPLICATION FOR RELIEF	7
IV.	CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Assaad v. Ashcroft, 378 F.3d 471 (5th Cir. 2004) 4

Bridges v. Wixon, 326 U.S. 135 (1945) 1, 4

Coleman v. Thompson, 501 U.S. 722 (1991) 4

Dakane v. Attorney General, 371 F.3d 771 (11th Cir. 2004) 6

Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992) 8

Fiallo v. Bell, 430 U.S. 787 (1977) 2

Heikkila v. Barber, 345 U.S. 229 (1953) i

INS v. Elias-Zacarias, 502 U.S. 478 (1992) 10

INS v. St. Cyr, 533 U.S. 289 (2001) 9

Jay v. Boyd, 351 U.S. 345 (1956) 1

Miranda-Lores v. INS, 17 F.3d 84 (5th Cir. 1994) 4, 10

Pennsylvania v. Finley, 481 U.S. 551 (1987) 4, 6

United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954) 1, 2, 3

United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957) 1

ADMINISTRATIVE DECISIONS

Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995) 9

Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988) 8

Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998) 9

TABLE OF AUTHORITIES – Continued

Page

Matter of L-S-, 22 I&N Dec. 645 (BIA 1999) 8

Matter of Marin, 16 I&N Dec. 581 (BIA 1978) 8

Matter of Tiwari, 19 I&N Dec. 875 (BIA 1989) 8, 9

STATUTES

8 U.S.C. §1101(a)(43)(N) 8

8 U.S.C. §1231(b)(3)(B)(ii) 8

8 U.S.C. §1252(b)(4)(B) 10

I. INTRODUCTION

The primary issue presented herein is whether immigrants are entitled to Due Process in the adjudication of applications for statutorily prescribed forms of discretionary relief from removal. Although Respondent asserts that the Fifth Circuit opinion "does not conflict with any decision of this Court or of another court of appeals," (RESP:5), no attempt is made to confront Petitioner's showing that: 1) it conflicts with several Supreme Court decisions, including *U.S. ex rel Accardi v. Shaughnessy,* 347 U.S. 260 (1954) (remanding for an evidentiary hearing in habeas corpus on claim of Due Process violation in adjudicating application for discretionary relief); *U.S. ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957) (addressing denial of discretionary relief); and *Bridges v. Wixon,* 326 U.S. 135, 145 (1945) (Because "the liberty of an individual is at stake . . . [deportation procedures must meet] essential standards of fairness"), (PET:4-5,13)[4] and 2) that the issue has been treated inconsistently among the circuits, and, as is the case with the Fifth Circuit, (PET:14-16), even within a given circuit.

Respondent also ignores Ms. Zamora's claims that the *custody* created by a removal order creates a liberty interest, (PET:4-6), and this Court's precedent holding that Due Process rights attach where, as here, standards have been established for the exercise of discretion, *by settled course of adjudication.* (PET:6-7).

---

[4] Petitioner erroneously included *Jay v. Boyd*, 351 U.S. 345, 363 (1956), in this series, (PET:4,12), as the language quoted therein was from the dissenting opinion.

Rather, Respondent raises red herrings such as that Petitioner did not seek certiorari on the BIA's finding that she failed to show prejudice, (RESP:6), and that ineffective assistance of counsel in removal proceedings cannot violate Due Process because immigrants have no right to appointed counsel in such proceedings, (RESP:7). The former is not ripe, because the Fifth Circuit did not rule against her on that point, and the latter is based on an argument which has not been adopted by any Circuit Court of Appeals, and which several circuits, and the BIA, have explicitly rejected.

And even though no act of Congress is challenged herein, Respondent invokes such irrelevant truisms as the quotation from *Fiallo v. Bell,* 430 U.S. 787, 792 (1977), that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens," (RESP:10). Respondent also restates the ultimate issue as if it were black-letter law, (RESP:11):

> Because that discretionary decision implicated no constitutionally-protected liberty or property interest of petitioner's she had no Due Process Clause rights of any sort in those proceedings . . .

In truth, a crucial issue is presented herein, on which there is great confusion in the Courts of Appeals, notwithstanding this Court's decisions such as *Accardi*, which should have settled the matter.

II. REBUTTAL FACTS

In stating the facts, Respondent omits several key points: 1) the $1,000 Ms. Zamora received was to cover the costs of taking the two young girls to Indiana, of which less than $100 was left when she was apprehended,

(APP:28,48); 2) the application for relief was completed, and presented to INS to process the fee, a week before the deadline, leading the IJ to find that the Representative's "explanation for failure to timely file the application or even to request an extension of time" was not a "sufficient reason to [accept] the late filing," (APP:5,6,47); and 3) in finding that Ms. Zamora had not presented "significant evidence that her equities outweigh[ed]" her offense, the BIA made no mention of her equities, the evidence presented in support thereof, or the legal standard applied in making this determination, (APP:3).

III. REBUTTAL ARGUMENT

A. THE FIFTH CIRCUIT'S HOLDING THAT EVEN LPRS ARE NOT ENTITLED TO DUE PROCESS IN MATTERS RELATING DISCRETIONARY RELIEF CONFLICTS WITH VARIOUS DECISIONS OF THIS COURT, WITH OTHER CIRCUIT PRECEDENT, AND EVEN WITH ITS OWN PRIOR DECISIONS.

Respondent's claim that the decision herein conflicts neither with precedent from this Court, nor with that of other circuits, is simply false. To the contrary, as previously shown, (PET:4,13), this Court entertained a Due Process claim in denying discretionary relief in *Accardi*. The fact that, as Respondent notes, (RESP:11-12), the Due Process violation in *Accardi* involved a failure to follow the regulations, whereas here it is ineffective assistance of counsel, is a distinction without a difference. The blanket holding of the Fifth Circuit that aliens have no Due Process rights in the adjudication of applications for discretionary relief is flat-out inconsistent with *Accardi*. And, as was also previously shown, (PET:11-18), there is rampant confusion,

not only among the circuits, but *within* the circuits,[5] on this crucial issue.[6]

B. NEITHER THE BIA, NOR ANY CIRCUIT COURT OF APPEALS, HAS ADOPTED RESPONDENT'S CLAIM (UNDER CASES SUCH AS *COLEMAN*), THAT INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT CAUSE A DUE PROCESS VIOLATION.

Respondent claims that ineffective assistance of counsel in removal proceedings cannot violate Due Process because there is no right to appointed counsel in such proceedings, (RESP:5-11). To date, no Circuit Court of Appeals has adopted this position, and several circuits, and the BIA, have expressly rejected it. (PET:2,7). Although in *Assaad v. Ashcroft,* 378 F.3d 471 (5th Cir. 2004), the Court appeared poised to backtrack on its earlier decisions on this point, such as *Miranda-Lores, supra,* it has not done so.

As Ms. Zamora argued to the Fifth Circuit, cases such as *Coleman* are inapplicable. The pertinent question is not whether she has a constitutional right to appointed counsel, but whether, given the nature of removal proceedings, she is, as this Court held in *Bridges, supra*, entitled to Due Process protections. *See, e.g., Pennsylvania v. Finley,* 481 U.S. 551, 555-6 (1987) (emphasis added):

---

[5] Notably, the Fifth Circuit decision at issue even conflicts with its own prior precedent. *See,* (PET:14-16).

[6] Respondent *almost* acknowledges the circuit split on the issue of whether such Due Process rights exist, (RESP:13) ("Even assuming that some disuniformity exists in this area . . . ").

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, *see Johnson v. Avery*, 393 U.S. 483, 488 (1969), and we decline to so hold today. . . .
>
> In *Ross v. Moffitt, supra*, we analyzed the defendant's claim to appointed counsel on discretionary review under two theories. *We concluded that the fundamental fairness exacted by the Due Process Clause did not require appointment of counsel*:
>
> > "It is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. . . ."

This Court further noted, *id.* at 546 (emphasis added):

> [T]he fact that the defendant has been afforded assistance of counsel in some form does not end the inquiry for federal constitutional purposes. Rather, *it is the source of that right to a lawyer's assistance, **combined with the nature of the***

> ***proceedings**, that controls the constitutional question. . . .*
>
> We think that the analysis that we followed in *Ross* forecloses respondent's constitutional claim. *The procedures followed by respondent's habeas counsel fully* ***comported with fundamental fairness.***

Thus the issue herein is whether ineffective assistance may affect the "fundamental fairness" of removal proceedings: proceedings where the "accused" has a constitutional right to Due Process, and counsel functions as a shield for a person "'haled into court' by the [United States]." The key factor under the *Finley* analysis is the nature of the proceedings. Ms. Zamora's constitutional rights arise under the Fifth, rather than the Sixth, Amendment, but as seen from *Bridges*, they are equally potent. *See, e.g., Dakane v. Attorney General*, 371 F.3d 771, 774 (11th Cir. 2004):

> It is well established in this Circuit that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the constitutional right under the Fifth Amendment Due Process Clause to a fundamentally fair hearing to effective assistance of counsel where counsel has been obtained.

This reasoning applies *a fortiori* where counsel is a non-lawyer, accredited by the BIA to function as if he were an attorney, working for an organization on a "free legal services" list that the regulations mandate be given to all detained aliens, and which the IJ must ensure that they received. And, as previously shown, (PET.22-24), although the BIA is charged with overseeing their conduct, it has eschewed that responsibility, allegedly for lack of resources,

leaving such non-lawyers with no real oversight, and LPRs such as Ms. Zamora vulnerable to their errors.

Thus the fact that the malfeasance was committed by an Accredited Representative, rather than a licensed attorney, *strengthens* Ms. Zamora's claim, but is not *a necessary element* of that claim. This is therefore not a situation where a Due Process violation cannot be claimed absent involvement by a "state actor," to ensure that the government is not charged with responsibility "for conduct for which they cannot fairly be blamed," as Respondent urges, (RESP:9-10). Still, Respondent's failure to discipline the non-lawyers he accredits makes it eminently fair that he enable their victims to obtain relief from the dire consequences of their failings.

C. THE FIFTH CIRCUIT DID NOT REJECT MS. ZAMORA'S CHALLENGE TO THE BIA'S FINDING THAT SHE DID NOT SHOW PREJUDICE FROM HER ACCREDITED REPRESENTATIVE'S FAILURE TO TIMELY FILE HER APPLICATION FOR RELIEF.

Respondent also seems to be under the impression that either the Fifth Circuit sustained the BIA's finding of "no prejudice," or that Ms. Zamora did not raise the issue with that Court. Neither is true. Ms. Zamora did raise the issue with the Fifth Circuit, but the Court did not reach it. Rather, the Court held that *because* Ms. Zamora had no Due Process rights, the BIA did not err in dismissing her appeal for lack of prejudice. (APP:2).

The BIA rejected Ms. Zamora's ineffective assistance claim, without discussion or analysis, allegedly for lack of prejudice. (APP:3):

> Although the respondent claims that her attorney ineffectively represented her, she has not established that she was prejudiced by his representation.... The respondent was convicted of alien smuggling. She has presented no significant evidence that her equities outweigh this offense.

There are several flaws in this assertion. Grammatically, it is unclear whether the BIA found that her (unspecified) equities were insufficient to counterbalance the offense, or that she presented insufficient *evidence* of her equities.[7] Her equities were clearly "outstanding" under BIA and Fifth Circuit precedent.[8] Further, the sole negative factor[9] was the underlying offense: a single, misguided, humanitarian act. Such offenses do not involve moral turpitude.[10] Even if prosecuted as felonies, and therefore, aggravated felonies,[11] they are not "particularly serious crimes" under 8 U.S.C. §1231(b)(3)(B)(ii). *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999). As explained therein, *id.* at 655:

---

[7] The record contained a wealth of "evidence." The completed cancellation application showed that she has been an LPR since 1982, has a strong employment history, and numerous relatives in the U.S., all residing in the Rio Grande Valley. The supporting documents included copies of her parents' green cards, the birth certificates of four of her U.S. born siblings, and her recent tax returns, (APP:30-46). To the extent possible where no hearing was held, Ms. Zamora also showed rehabilitation, by prompt acceptance of responsibility, (APP:26-29).

[8] *See, Diaz-Resendez v. INS*, 960 F.2d 493, 496-97 (5th Cir. 1992), and *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988).

[9] *See, Matter of Marin*, 16 I&N Dec. 581, 585 (BIA 1978) (an application for 212(c) relief of necessity carries with it at least one adverse consideration (the ground of exclusion sought waived).

[10] *See, Matter of Tiwari*, 19 I&N Dec. 875 (BIA 1989).

[11] 8 U.S.C. §1101(a)(43)(N).

> In *Matter of Tiwari*, we considered whether alien smuggling for gain is committed with "fraud or evil intent." A review of precedent cases revealed that persons convicted under former section 274(a) for bringing aliens into the United States or for transporting them within the country had been motivated by love, charity, or kindness or by religious principles.

The legal environment surrounding such applications further shows that Ms. Zamora's chances of winning relief were in fact excellent. Under *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998), cancellation applications for LPRs are judged by the same standards as those for §212(c) relief. Over half of §212(c) applications were granted, even when LPRs convicted of drug smuggling and other aggravated felonies were eligible.[12] According to statistics relied upon by this Court in *St. Cyr*,[13] in the years from 1991 through 1995, 8,732 §212(c) applications were granted and 8,333 were denied.[14] Further, LPRs convicted of aggravated felonies are ineligible for cancellation. From this, one can fairly infer that the *percentage* of applications granted has *not* decreased, but has increased. At a minimum, more than half of such applications are doubtless still granted. Thus, as Ms. Zamora urged to the Fifth Circuit, her *statistical* chances of earning relief were better than 50%, and probably much, much higher. Ms. Zamora also urged that under *Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995), she was entitled to relief. Her equities are at least as strong as, if not stronger than, those presented therein. The negative factors are also significantly less than in *Arreguin*, which involved the smuggling of a

---

[12] *See, INS v. St. Cyr*, 533 U.S. 289, 296, n.5 (2001).

[13] Rannik, 28 U. Miami Inter-Am.L.Rev. 23, 150, n.80 Fall, 1996.

[14] An additional 3,798 applications were shown as "other."

large quantity of marijuana, and a sentence of at least two years, since she was still detained when the BIA granted her appeal, and afforded §212(c) relief.

Therefore, if and when the Fifth Circuit reaches the issue, it will doubtless hold that, as required by *Miranda-Lores, supra*, a *prima facie* case is made by showing that more than half such applications are granted, and that Ms. Zamora's case compares favorably with the benchmark BIA decision granting relief. Alternatively, viewed as a factual finding, the Court may well conclude that "any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. §1252(b)(4)(B). *See, INS v. Elias-Zacarias, supra.*

VII. CONCLUSION

For the foregoing reasons, Ms. Zamora urges this Court to issue a writ of certiorari to the Fifth Circuit, to resolve the inter- and intra-circuit court conflicts on the crucial issue of whether an alien's right to Due Process ceases once a finding of deportability has been made, and to determine whether the extreme consequences which can flow from the ineffective assistance of counsel can cause a failure of Due Process, particularly where counsel is a non-lawyer accredited by the Attorney General to function as an attorney, and as aggravated by the Attorney General's failure to conduct meaningful oversight over such accredited non-lawyers.

Respectfully Submitted,

LISA S. BRODYAGA, ESQ.
REFUGIO DEL RIO GRANDE
17891 Landrum Park Road
San Benito, Texas 78586
(956) 421-3226 (voice)
(956) 421-3423 (fax)